Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES F. NORTON, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INDEX TO APPENDICES

		App. Page
1.	Opinion of the Court of Appeals	1
2.	Order and Findings of the District Court on Remand	23
3.	Order and Findings of the District Court on Motion to Suppress	26
4.	Order of the Court of Appeals Staying Mandate	34
5.	Opinion of the Court of Appeals (*Accardo*)	36
6.	Judgment of the District Court	45
7.	Search Warrant (Consultants & Administrators, Inc.)	53
8.	Search Warrant (Pinckard and Associates, Inc.)	55
9.	Jury Instruction No. 32	57
10.	Juror Letter to the District Judge	58

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APPENDIX 1

[U.S. v. Norton, 867 F.2d 1354 (11th Cir. 1989)]

UNITED STATES of America,
Plaintiff-Appellee,

v.

James NORTON, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Paul FOSCO, James Pinckard,
Paul A. Di Franco, James Norton,
Defendants-Appellants.

Nos. 87-5425, 87-5648.

United States Court of Appeals
Eleventh Circuit.

March 16, 1989.

* * * * *

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

HENDERSON, Senior Circuit Judge:

Paul Fosco, Paul DiFranco, James Norton and James Pinckard were convicted in the United States District Court for the Southern District of Florida of conspiring to participate in racketeering activity involving the unlawful payment and receipt of money from employee welfare benefit plans in violation of 18 U.S.C. §§ 1954 and 1962(d). The

charged enterprise consisted of a building and construction workers' union ("the Laborers' Union"), its affiliated local unions in Miami and Chicago, and various employee benefit plans including the "Chicago Trust Fund" and the "Southeast Florida Trust Fund."

The kickback scheme originated in 1970 when the Chicago Trust Fund announced its intention to institute a dental care plan for union members. A corporation, Consultants & Administrators, Inc. ("C & A"), was formed to provide these services. Co-defendants Angelo Fosco, who was the father of Paul Fosco, and James Caporale exerted their influence as union representatives to insure that C & A obtained the contract in exchange for payments made to them through the corporation. James Norton was president of C & A, while Paul DiFranco, a dentist, and Paul Fosco, who purportedly handled sales and public relations, were named the corporation's vice presidents. The kickbacks were generated by inflating the appellants' salaries. The excess cash would then be returned to Daniel Milano, Sr., another C & A owner, who in turn paid the money to Angelo Fosco and Caporale.

In 1972 the operation expanded into Florida when C & A submitted its bid for a similar dental services contract for the benefit of Florida Laborers' Union members through a corporation called Dental Vision Care Centers ("DVCC"). Again, it was awarded the contract in exchange for agreeing to pay the Florida union and Trust Fund representatives a percentage of the premiums paid by the benefit fund under the contract. Pursuant to its agreement, DVCC made regular payoffs from 1973 to 1977 to a number of conspirator-controlled companies.

James Pinckard entered the picture in 1974 when the Chicago dental services contract was amended to include vision services and dental services for union members' dependents. Codefendant Alfred Pilotto, a Chicago Trust Fund representative, ensured that C & A would receive this lucrative "family contract" in return for a kickback consisting of 10% of C & A's increased premiums. Pay-

ments were to be funneled through a corporate arrangement similar to that employed in the Florida operation. Pilotto's son-in-law, Pinckard, acted as a conduit for the illegal payments through a corporation, Pinckard & Associates ("P & A"), ostensibly created to verify patients' eligibility for coverage under the contract.

Following a federal investigation of suspected labor racketeering activities involving these corporations, federal agents obtained search warrants authorizing the search of both C & A's and P & A's administrative offices. Shortly after their indictment, the appellants filed a motion to suppress all materials seized during the search. The district court ordered the corporate records suppressed because it found that the warrants were "unconstitutionally general." The government then filed an interlocutory appeal. This court vacated and remanded to the district court to determine whether the facts supported the application of the "good faith" exception to the exclusionary rule. *See United States v. Accardo*, 749 F.2d 1477 (11th Cir.), *cert. denied sub nom. Pinckard v. United States*, 474 U.S. 949, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985). After an evidentiary hearing, the district court denied the appellants' motion to suppress on the grounds that the law enforcement agents reasonably relied in good faith on the warrants. The appellants eventually were convicted by a jury on April 27, 1987.[1]

Norton urges reversal of his conviction and dismissal of the indictment on the grounds that the government failed to present sufficient evidence before the grand jury to support the indictment. This argument is foreclosed, however, by the decision in *Costello v. United States*, 350

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[1] Sixteen persons were indicted by the grand jury. The cases of the appellants were severed for trial from that of their codefendants. Of the remaining defendants, all were convicted except Angelo Fosco, Terrence O'Sullivan and Anthony Accardo, who were acquitted, and Santo Trafficante, who was later dismissed as a defendant.

U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), in which the United States Supreme Court held that inadequate or incompetent evidence before a grand jury could not be a basis for challenging an indictment where the indictment resulted in an otherwise valid conviction. 350 U.S. at 363-64, 76 S.Ct. at 409, 100 L.Ed.2d at 402-03. This court consistently has followed the *Costello* rule to preclude appellate review of sufficiency of the evidence before the grand jury. *See, e.g., United States v. DiBernardo*, 775 F.2d 1470, 1478 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1948, 90 L.Ed.2d 357 (1986); *United States v. Cruz*, 478 F.2d 408, 412 (5th Cir.), *cert. denied sub nom. Aleman v. United States*, 414 U.S. 910, 94 S.Ct. 259, 38 L.Ed.2d 148 (1973); *Cohen v. United States*, 436 F.2d 586, 587 (5th Cir.), *cert. denied*, 403 U.S. 908, 91 S.Ct. 2215, 29 L.Ed.2d 684 (1971). We therefore decline to review it here.

The appellants also challenge the sufficiency of the evidence on two other grounds. First, Pinckard contends that the government's case against him failed because he was not a member of any of the four classes of person subject to the statute.[2] Contrary to this assertion, Pinckard's

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[2] The four categories enumerated in 18 U.S.C. § 1954 are:

> (1) An administrator, officer, trustee, custodian, counsel, agent, or employee of any welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee or an employer or any employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
>
> (4) a person who, or an officer, counsel, agent, or employee of an organization which provides benefit plan services to such plan [who] receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . .

involvement fell within the fourth classification contained in the statute, which includes any "person who, or an officer, counsel, agent or employee of an organization which provides benefit plan services" to an employee pension benefit plan. 18 U.S.C. § 1954(4). The statute does not require direct employment by the benefit plan. *See United States v. Russo*, 442 F.2d 498, 502 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023, 92 S.Ct. 669, 30 L.Ed.2d 673 (1972). Pinckard provided such services to the plan through C & A, which contracted directly with the Chicago Trust Fund. Since P & A was created primarily to serve as a channel for kickbacks to Alfred Pilotto, who had obtained the contract for C & A, we find his connection to C & A sufficient to sustain his guilt for an offense under Section 1954. That Pinckard "knowingly joined the group which *agreed to make*" payments to Pilotto, a benefit fund trustee, is more than sufficient to uphold his conviction. *See United States v. Provenzano*, 615 F.2d 37, 44 (2d Cir.) (emphasis in original), *cert. denied*, 446 U.S. 953, 100 S.Ct. 2921, 64 L.Ed.2d 810 (1980).

Moreover, 18 U.S.C. § 1954 also includes "*any* person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money or thing of value prohibited by this section." (emphasis supplied). Given the ample evidence that Pinckard was not only aware of the others' participation in the scheme, but also that he agreed to forward the payments to Pilotto, his conviction under Section 1954 is supported on either of these grounds.

Pinckard was not charged with a Section 1954 violation but with conspiracy to conduct the affairs of an enterprise through a pattern of "racketeering activity" in violation of 18 U.S.C. § 1962(d). Even if he could not be found guilty as a principal under Section 1954, "[t]he government need only prove that [the] defendant conspired to commit the substantive RICO offense and was aware that others had done likewise" in order to support a RICO conspiracy charge. *United States v. Pepe*, 747 F.2d 632,

660 (11th Cir. 1984). Thus, Pinckard's related argument that the indictment must fail because it did not allege that he was a member of the class of persons amenable to section 1954 is without merit.

18 U.S.C. §§ 1962(c) and (d) make it a crime to conspire to participate in the affairs of "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce . . . through a pattern of racketeering activity." The appellants' second attack on the sufficiency of the evidence centers around the government's alleged failure to establish the requisite nexus between the enterprise and interstate commerce.

The charged enterprise was the Laborers' Union, its subordinate local unions, and its affiliated employee benefit plans. It is well established that the enterprise, and not the individual charged with violating the statute, must engage in or affect interstate commerce. *See, e.g., United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985), *cert. denied sub nom. Callanan v. United States*, 475 U.S. 1098, 106 S.ct. 1499, 89 L.Ed.2d 899 (1986); *United States v. Conn*, 769 F.2d 420, 423-24 (7th Cir. 1985); *United States v. Dickens*, 695 F.2d 765, 781 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983); *United States v. Groff*, 643 F.2d 396, 400 (6th Cir.), *cert. denied sub nom. Turbyfill v. United States*, 454 U.S. 828, 102 S.Ct. 121, 70 L.Ed.2d 103 (1981); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). Although a criminal undertaking often is involved, in many cases the government charges an enterprise consisting of a legitimate organization, the activities of which are conducted through a pattern of racketeering. *See, e.g., United States v. Stratton*, 649 F.2d 1066, 1075 n. 12 (5th Cir. 1981). The Laborers' Union and its subordinate locals in various states including Florida and Illinois, as well as its affiliated benefit plans, was just such an enterprise, representing thousands

of employees in the building and construction industries.[3] Where, as here, the "very nature of the powers and duties" conferred upon the enterprise is interstate in character, the requisite interstate nexus is present. *Cf. United States v. Bagnariol*, 665 F.2d 877, 893 (9th Cir. 1981), *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982); *United States v. Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980). The requirement also is met if the enterprise affects interstate commerce, even though it is the racketeering activities that influence commerce. *United States v. Conn*, 769 F.2d at 424; *accord United States v. Qaoud*, 777 F.2d at 1116; *United States v. Dickens*, 695 F.2d at 781. Here, various officials and representatives of the Laborers' Union locals and their benefit funds traveled between Florida and Illinois to discuss conspiratorial matters, including payoffs from C & A pursuant to the conspiracy. Accordingly, there was more than sufficient evidence of an interstate commerce connection to support the appellants' convictions.

As stated earlier, the district court, on a remand from this court, conducted an evidentiary hearing on the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). This remand and subsequent hearing grew out of the government's interlocutory appeal of the district court's grant of a motion to suppress evidence seized pursuant to certain search warrants. The warrants in question called for the search and seizure of "all corporate records . . . which are evidence and instrumentalities of the offense set forth

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[3] In *Donovan v. S & L Development Co.*, 647 F.2d 14, 18 (9th Cir. 1981), the court noted that "any construction work, regardless of the size or duration of the project, is likely to have an effect on interstate commerce." Also, Congress has specifically found that employee benefit plans have become "increasingly interstate" in their "operational scope and economic impact." *See* 29 U.S.C. § 1001(a).

in Section 1954 of Title 18 United States Code." *See United States v. Accardo*, 749 F.2d 1477 (11th Cir.), *cert. denied sub nom. Pinckard v. United States*, 474 U.S. 949, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985). In *Accardo*, we decided as a matter of law that the good faith exception applied, specifically stating that the warrants' authorization to seize "all corporate records" did not transgress the limitation on the good faith exception involving warrants " 'so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' " *Accardo*, 749 F.2d at 1481 (quoting *Leon*, 104 S.Ct. at 3421). We remanded the case to the district court, however, to afford the parties a hearing on the good faith issue.

On remand the district court found that the law enforcement officers justifiably relied in good faith on the validity of the warrants, and accordingly denied appellants' motion to suppress evidence pursuant to those warrants. Although this court has *de novo* review over the legal issue of whether the officers' reliance on the warrants was objectively reasonable, "the underlying facts upon which that determination is based are binding on appeal unless clearly erroneous." *United States v. Maggitt*, 778 F.2d 1029, 1035 (5th Cir. 1985), *cert. denied*, 476 U.S. 1184, 106 S.Ct. 2920, 91 L.Ed.2d 548 (1986); *accord Accardo*, 749 F.2d at 1481.

More than adequate support exists for the district court's determination that the agents acted in justifiable reliance on the warrants. As we noted in *Accardo*, the agents here "took every step that could reasonably be expected of them," including the submission of an affidavit detailing the pervasive fraud perpetuated by C & A and P & A, which was reviewed and approved by several prosecutors before its presentation to a magistrate. *Cf. Sheppard*, 468 U.S. at 989, 104 S.Ct. at 3428, 82 L.Ed.2d at 744. At the hearing on remand, the FBI Agent who applied for both warrants testified that he believed he needed all of C & A's and P & A's corporate records, especially financial and employment records, to verify the

kickback scheme. Because this investigation required the authorities to piece together a "paper puzzle" given the permeative character of the fraud involved, we find that the agent's belief was objectively reasonable. "The reasonableness of the search depends upon the complexity of the crime being investigated and the difficulty involved in determining whether certain documents evidence fraud." *United States v. Sawyer*, 799 F.2d at 1509. The district court's denial of appellant's motion to suppress was therefore not error.

Our review of the record reveals no reversible grounds for the appellants' various challenges to the district court's admission of certain evidence at trial. We reject Fosco's claim that the district court's admission of purported "other crimes" evidence deprived him of a fair trial. Daniel Milano, Jr. ("Milano, Jr."), the prosecution's key witness, testified that both he and Fosco received a monthly raise from C & A in 1975. He further stated that he discussed these increases with his father, Daniel Milano, Sr. ("Milano, Sr."), and Fosco, during which Milano, Sr. instructed his son to return a portion of the raise to him, and similarly directed Fosco to pay his increased supplement to his father, Angelo Fosco. Fosco urges that the testimony concerning Milano, Jr.'s excess payment to Milano, Sr. was unrelated to Fosco's alleged involvement in the conspiracy and unfairly created the inference that he, too, was involved in multiple kickback schemes. Thus, he argues, this evidence allowed the jury to base his conviction on other crimes or extrinsic acts for which he was not charged. This testimony, however, is completely outside the reach of Rule 404(b) of the Federal Rules of Evidence.[4] Rule 404(b) deals only with acts committed by the

[4] Fed.R.Evid. 404(b) provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

defendant himself, not with crimes committed by other members of the conspiracy. *See United States v. Meester*, 762 F.2d 867, 877 (11th Cir.), *cert. denied sub nom. Sawyer v. United States*, 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *United States v. Bates*, 600 F.2d 505, 509 (5th Cir. 1979). The purpose of the rule is to prevent the jury from considering evidence that the *defendant* has, at other times, committed bad acts to convict him of the charged offense.[5] *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979). We further note that an act cannot be characterized as extrinsic and therefore subject to Rule 404(b) when "the evidence concerning that act and the evidence used to prove the crime charged are inextricably intertwined." *Id.* Where, as here, the evidence concerning Milano, Jr.'s illegal payment was "intertwined with the evidence of the ongoing conspiracies . . . [it] cannot be labeled 'extrinsic'." *United States v. Meester*, 762 F.2d at 877 (citing *United States v. Aleman, supra*).

Pinckard makes two complaints about the admissibility of evidence against him. First, he contends that the government's introduction of checks made payable to him and totalling over $334,000.00 constituted an improper attempt to forge a link between his financial status and his guilt. He insists that the check evidence was irrelevant under

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[5] Fosco is precluded from arguing that Milano, Jr.'s testimony with respect to Fosco's complicity falls within the parameters of Rule 404(b). The indictment specifically alleged that during the relevant time period "defendant PAUL FOSCO *had conversations with* and received payments from employees of Consultants and Administrators as illegal kickbacks for his father, defendant ANGELO FOSCO." (emphasis added). Milano, Jr.'s testimony concerning Fosco cannot be termed evidence of acts extrinsic to those for which he was indicted. *See United States v. Finestone*, 816 F.2d 583, 586-87 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987).

Fed.R.Evid. 402,[6] and even if minimally material, was highly prejudicial and thus inadmissible under Rule 403.[7]

The district court possesses broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue. *United States v. Finestone*, 816 F.2d 583, 585 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987); *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983), *cert. denied sub nom. McGlocklin v. United States*, 466 U.S. 942, 104 S.Ct. 1924, 80 L.Ed.2d 470 (1984). Conversely, we are mindful that the court's discretion to exclude evidence under Rule 403 is narrowly circumscribed. "Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence." *United States v. Betancourt*, 734 F.2d 750, 757 (11th Cir.), *cert. denied*, 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 514 (1984); *accord United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir.), *cert. denied*, 469 U.S. 843, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984). The balance under the Rule, therefore, should be struck in favor of admissibility. *Finestone*, 816 F.2d at 585. The district court is vested with considerable discretion to admit such probative evidence. Its decision will not form a basis for reversible error "unless the defendant can demonstrate abuse of that discretion." *United States v. Mitchell*, 666

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[6] Fed.R.Evid. 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[7] Fed.R.Evid. 403 provides that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.2d 1385, 1390 (11th Cir.), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1340 (1982).

Admission of the disputed checks was relevant to establish the conspiracy. It showed that funds were to be returned to Pilotto, Pinckard's father-in-law; that Pilotto received a benefit or "thing of value," and that Pinckard was compensated for his role in the charged offense. Although the government produced no direct evidence that Pinckard transferred any of the check proceeds to Pilotto, the jury, buttressed by Milano, Jr.'s testimony concerning Pinckard's participation in the scheme, certainly was entitled to infer from the evidence that the checks made to Pinckard were intended to generate kickbacks to Pilotto. *Cf. United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975). Neither does this evidence merit exclusion under Rule 403. While it is true that "[a]ll evidence which tends to establish the guilt of a defendant is, in one sense, prejudicial to that defendant, .'. . that does not mean that such evidence should be excluded. It is only when the probative value of evidence is 'substantially outweighed by the danger of *unfair* prejudice' . . . that relevant evidence should be excluded." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982) (emphasis in original), *accord United States v. Betancourt*, 734 F.2d at 757; *United States v. King*, 713 F.2d at 631. We are not persuaded by Pinckard's attempt to compare his case with *United States v. Nill*, 518 F.2d 793 (5th Cir. 1975). In *Nill*, the prosecutor had cross-examined the defendant as to his ambitions to become a millionaire. The former Fifth Circuit Court of Appeals reversed the defendant's conviction on the grounds that the cross examination "was allowed to generate into a personal attack calculated to appeal to bias on the part of the jury." 518 F.2d at 802. No such circumstances are present here. Moreover, the court in *Nill* noted that evidence of the appellant's salary would be relevant to show he had fraudulently concealed certain financial transactions. Similarly, the checks in this case were properly admitted to establish the offense.

Pinckard next maintains that the district court erred in admitting a summary chart and related testimony on the grounds that they did not conform with the evidence presented at the trial. There was no error.

We recognize the caution with which these summaries are to be utilized, given the possibilities for abuse. *See Gordon v. United States*, 438 F.2d 858, 876 (5th Cir.), *cert. denied*, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971); *Myers v. United States*, 356 F.2d 469, 470 (5th Cir.), *cert. denied*, 384 U.S. 952, 86 S.Ct. 1572, 16 L.Ed.2d 548 (1966). The decision to allow the use of such illustrative charts, however, is a matter well within the trial court's discretion and is subject to reversal only if there has been an abuse of that discretion. *United States v. Diez*, 515 F.2d 892, 906 (5th Cir. 1975), *cert. denied*, 432 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *Baines v. United States*, 426 F.2d 833, 840 (5th Cir. 1970). Any issue as to the propriety of introducing summaries during a trial was foreclosed by the enactment of Fed.R.Evid. 1006 in 1975.[8] *United States v. Smyth*, 556 F.2d 1179, 1183 (5th Cir.), *cert. denied*, 434 U.S. 862, 98 S.Ct. 190, 54 L.Ed.2d 135 (1977).

The government's chart and accompanying testimony illustrated that payments to the conduit companies represented approximately 15% of the premiums paid by the Southeast Florida Trust Fund to DVCC and two of DVCC's affiliated doctors, Graham and Catarello. Pinckard objects to the chart, arguing that it erroneously assumed that payments to Graham and Catarello were part of the 15% calculation. Without their inclusion, he asserts, the per-

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[8] Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

centages would not corroborate the testimony provided by Daniel Milano, Jr., upon which the government extensively relied. The chart's assumptions, however, are amply supported by the evidence presented to the jury. The witness who prepared the summary chart explained that payments made to these two doctors were, in effect, payments to DVCC since they provided health care services as independent contractors for DVCC pursuant to DVCC's contract with the Florida Trust Fund. "[T]he essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." *United States v. Diez*, 515 F.2d at 905; *accord United States v. Jennings*, 724 F.2d 436, 442 (5th Cir.), *cert. denied*, 467 U.S. 1227, 104 S.Ct. 2682, 81 L.Ed.2d 877 (1984). Furthermore, where, as here, the defense conducted a thorough cross examination of the witness concerning the disputed matters, and also had the opportunity to present its own version of those matters, the likelihood of any error in admitting summary evidence diminishes. *See id.* at 442; *United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983). Coupled with the trial court's accompanying instruction to the jury that the summary chart was not evidence and therefore should be accorded its due weight, we find that the court did not abuse its discretion in admitting it. *See United States v. Smyth*, 556 F.2d at 1185; *accord United States v. Diez*, 515 F.2d at 905.

The district court also did not err in admitting a memorandum which detailed a telephone conversation between Robert Paul and Wendyl Link, two former officers of the Segal Company, a consulting firm that had rendered services to the Laborers' Union. The document, which was prepared by Paul and admitted into evidence through Link's testimony, reflected Link's concerns over Norton's suspected involvement in the dental plan. Norton contends that the memorandum was inadmissible under the business records exception to the rule against hearsay because Link had no personal knowledge of its contents, that there was insufficient evidence to establish that the memoran-

dum was created as part of a regular business practice or that it was made at or near the time of the conversation, and that it was patently untrustworthy.[9] Our examination of the record refutes this. There was more than ample evidence to warrant admission of the memorandum under Rule 803(6).

Neither are we persuaded by Norton's argument that admission of the memorandum violated his right to confront witnesses against him. The challenged memorandum was, as we have stated, sufficiently trustworthy and reliable. Also, defense counsel had the opportunity to cross examine the custodian, Link, respecting its accuracy. *See United States v. Peden*, 556 F.2d 278, 281 (5th Cir.), *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977). The Supreme Court recently observed in a related context that the prosecution is not required to demonstrate either unavailability of the declarant or an independent indicia of reliability when the evidence falls within a hearsay exception as "firmly rooted" as the co-conspirator exception to the hearsay rule. *Bourjaily v. United States*, 483 U.S. 171, ____, 107 S.Ct. 2775, 2782-83, 97 L.Ed.2d 144, 157 (1987). By analogy, we find the business records exception to the hearsay rule to be "firmly enough rooted in our jurisprudence" to satisfy the requirements of the Confrontation Clause where, as here, the document was properly admitted under the exception. *Id.* "Properly administered the business and public records exceptions

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[9] Fed.R.Evid. 803(6) provides in pertinent part:

> A memorandum . . . of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, [is not excluded by the hearsay rule, even though the declarant is available as a witness] if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . . as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.

would seem to be among the safest of the hearsay exceptions." *Ohio v. Roberts*, 448 U.S. 56, 66 n. 8, 100 S.Ct. 2531, 2539 n. 8, 65 L.Ed.2d 597, 608 n. 8 (1980).

Nor do we find that the admission of certain documentary evidence, consisting of various contracts, letters, invoices, checks, deposit slips, vouchers, and bank statements constituted an abuse of discretion. There is more than enough evidence in the record to establish a proper foundation for the challenged records and to support their admission under Rule 803(6).

The appellants charge that the prosecutor's comments in summation amounted to a direct reference to their failure to testify, thereby depriving them of a fair trial, is likewise without merit. Although a prosecutor's direct reference to a defendant's failure to testify clearly violates the defendant's fifth amendment right against self incrimination, entitling him to a new trial, *see Griffin v. California*, 380 U.S. 609, 612-14, 85 S.Ct. 1229, 1232-33, 14 L.Ed.2d 106, 108 (1965); *accord Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir. 1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985), an indirect reference to such a failure is not reversible error per se. Rather, the court must assess the impact of the statement in terms of the context in which it was made. *Id.* A comment is deemed to refer to a defendant's silence if either (1) it was the prosecutor's manifest intention to refer to the defendant's silence or (2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1377, 94, L.Ed. 2d 692 (1987).

Here, the prosecutor did not directly refer to the *defendants'* decision not to testify, but to *defense counsel's*

failure to rebut the government's evidence.[10] This court repeatedly has held that a defendant's fifth amendment privilege is not infringed by a comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced. *See United States v. Davidson*, 768 F.2d 1266, 1272 (11th Cir. 1985); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980); *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977); *United States v. Hill*, 508 F.2d 345, 347 (5th Cir.), *cert. denied*, 422 U.S. 1009, 95 S.Ct. 2633, 45 L.Ed.2d 672 (1975). In the context of this case, we do not believe the prosecutor's statement to be such that the

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[10] The prosecutor stated in his closing argument:

> "If you saw all this evidence, you heard everything except Nancy Moreland, Sandra Varco and Danny Milano, you would probably be almost convinced these defendants had been in a scheme to pay bribes. You would be waiting to hear the explanation of how it was not so, and when the people who got up on the stand, who knew about it testified, they said, oh, yes, it was so. Danny Milano, Nancy Milano [sic] and Sandra Varco; what they said makes sense. Is any other explanation reasonable? Not that you heard one, but is any other explanation reasonable? I have been going for a little over two hours and I will stop now and I will wait to hear that reasonable explanation. I will ask you to listen to it very carefully. I will invite defense counsel to provide you with that explanation."

During the rebuttal portion of his closing argument, the prosecutor then repeated the lack of any reasonable explanation and his exhortation to defense counsel to provide one:

> "I told you before I sat down a few minutes ago that if there was another explanation for this circumstantial evidence, that I certainly was going to invite defense counsel to get up and tell you what it was. I have not heard one explanation. Not one. Because there is not any other explanation. If there is no other explanation it means very simply where [sic] Danny Milano and Sandra Varco and Nancy Moreland have told you here under oath is in fact the truth. If it is the truth, then you have to return verdicts of guilty as to these defendants."

jury would "naturally and necessarily" construe it as a comment on the defendants' silence. We more reasonably view it as a permissible "comment on logical inferences from all of the evidence rather than an argument requiring a negative inference from the defendant's failure to testify." *United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987).

During the jury deliberations, one of the jurors sent a note to the judge requesting that he be excused because the other jurors wanted to convict the defendants while he entertained some doubt as to their guilt. He also inquired whether he was compelled to vote with the majority "even under duress." The defendants made a motion for a mistrial which was denied by the court. The court informed the juror that he could not be excused and further advised him that he was not compelled to vote under duress. The trial judge then gave further instructions to the jury. The jury resumed its deliberations and returned guilty verdicts against all the defendants some four hours later. This incident provides the inspiration for the final assignment of error by raising the question of whether the circumstances surrounding the jury's deliberations resulted in coerced verdicts. The appellants argue that the juror's note, which revealed the jury's numerical division as to guilt and acquittal as well as that juror's doubts about the defendants' guilt, followed by the judge's refusal to inquire into the nature of the "duress" allegedly experienced by the juror, created confusion among the jury.[11] They also argue that the trial judge's subsequent

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[11] The juror's note read as follows:

> "Your Honor, in order to avoid another lengthy and expensive trial, would it be possible to surrender my seat No. 8 to the No. 1 alternate juror to get a verdict in this case?
>
> I have reasonable doubts in this case and the other eleven jurors are voting guilty on all four defendants. My conscious [sic] tells me otherwise and I dislike having a hung jury.

(Footnote continued on following page)

recharge of the jury improperly urged a verdict and contributed to the coercive atmosphere already created by the juror's note.[12]

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[11] *continued*

I would appreciate your help in my behalf. Thank you kindly.

Robert J. Larson, Juror No. 8

Must I vote with the majority, even under duress, Your Honor? Please advise."

The court then informed the juror that he could not be replaced and that he was not obliged to vote with the majority, "even under duress."

[12] In recharging the jury, the trial judge gave the following instruction:

"Ladies and gentlemen, I do not want to emphasize one particular charge. I want you to study the entire charge, but I am going to bring to your attention one of the charges that is presently in the package of the charges I gave you orally yesterday.

I invite you to study again the entire charge, any verdict that (sic) must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto; in other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to the individual judgment.

Some of you must decide the case for yourselves, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, you should not hesitate to remember about whether in your own views, [to] change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times that you are not partisans. You are judges of the facts as your sole interest is to seek the truth from the evidence in the case.

Ladies and gentlemen, you may again retire to consider your verdict."

The appellants cite *Brasfield v. United States*, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926) and its progeny as support for their argument. *Brasfield*, however, differs from this case in several important respects. The United States Supreme Court held in *Brasfield* that a trial judge's inquiry into the jury's numerical division constituted grounds for reversal. *Brasfield*, 272 U.S. at 450, 47 S.Ct. at 135-36, 71 L.Ed. at 346. In the instant case, the juror offered this information without any solicitation from the judge. Although an inquiry by the court clearly is improper, the former Fifth Circuit Court of Appeals has recognized that the unsolicited disclosure of the jury's division by a juror is not by itself a ground for a mistrial. *United States v. Warren*, 594 F.2d 1046, 1049 (5th Cir. 1979); *accord Sanders v. United States*, 415 F.2d 621, 631-32 (5th Cir. 1969), *cert. denied*, 397 U.S. 976, 90 S.Ct. 1096, 25 L.Ed.2d 271 (1970).

We are aware of a number of cases following *Brasfield* in which the courts have found coercion to exist regardless of whether the disclosure was solicited by the judge or voluntarily provided by a juror. In each of these cases, however, the trial judge's awareness of the jury's division was accompanied by giving an *Allen* charge, in its pure or modified form.[13] *See, e.g., United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987); *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964). Reversal may not be necessary even where the trial judge undertakes the inquiry and thereafter follows it with an *Allen* charge, absent a showing that either incident or a combination of the two was inherently coercive. *See Cornell v. Iowa*, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126, 101 S. Ct. 944, 67 L.Ed.2d 112 (1981); *see also Butler v. United States*, 254 F.2d 875, 876 (5th Cir. 1958) (trial judge's inquiry as to numerical standing on conviction or acquittal

[13] *See Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

held not reversible error where it had no coercive effect on jury and did not affect substantial rights of defendant); *accord Beale v. United States*, 263 F.2d 215, 217 (5th Cir. 1959).

We disagree with appellants' assertion that the instruction given to the jury by the trial judge following juror Larson's note was nothing less than a "watered-down *Allen* charge." Although the judge did encourage the jurors to consult with each other and be open to the possibility of changing their position, we do not construe the instruction as an exhortation of the minority to reexamine its views in deference to the majority, or to suggest that the majority's position is correct. Moreover, the instruction did not contain several other hallmarks of an *Allen* charge, namely that it would be expensive and time-consuming to retry the case, and that no future jury would be better suited to decide the case. In its totality the instruction in this case cannot be said to approximate an *Allen* charge or to in any other way urge a verdict.[14] In addition, no other indicia of jury coercion are present in the record. The jury deliberated some four hours after the trial court's supplementary instruction, a time period not suggestive of a coercive or pressure-filled atmosphere.

We also dismiss the argument that the court's additional charge to the jury failed to include an instruction on reasonable doubt. "[I]f the supplemental instruction admonishes as here that the jurors should not 'acquiesce' in a verdict or do violence to their consciences, no harm will be found in the trial court's failure to instruct regarding the burden of proof." *United States v. Bailey*, 468 F.2d 652, 663 (5th Cir. 1972).

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[14] We do observe that although the *Allen* charge has been the subject of heated controversy, its continuing viability has been recognized by this court. *See United States v. Rey*, 811 F.2d 1453 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987).

Nor do we find error in the trial judge's decision not to question the juror regarding the "duress" he may have experienced during jury deliberations. To have done so would itself have risked reversible error, since the juror's note made clear that the pressure allegedly placed upon him resulted from discussions between the jurors and not from extraneous prejudicial information. *See* Fed.R.Evid. 606(b). The alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the guilty verdict. *United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988), *cert. denied sub nom., Barker v. United States*, ____ U.S. ____, 109 S.Ct. 813, ____ L. Ed.2d ____ (1989); *United States v. Blackburn*, 446 F.2d 1089, 1090-91 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972).

For the foregoing reasons, the judgments of conviction are

AFFIRMED.

APPENDIX 2

[Filed February 13, 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-230-CR-KEHOE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY ACCARDO, et al.,

Defendants.

(Defendants P. Fosco, DiFranco, Pinckard and Norton)

ORDER ON REMAND

Pursuant to the Mandate issued by the United States Court of Appeals for the Eleventh Circuit in *United States v. Accardo*, 749 F.2d 1477 (1985) an evidentiary hearing was held to determine whether the good-faith exception to the Fourth Amendment exclusionary rule as enunciated in *United States v. Leon*, 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1985) is applicable to the instant case.

At the conclusion of the evidentiary hearing, the Court finds that the parties failed to adduce any additional material facts than those previously presented at the initial motion to suppress hearing and summarized by the Court in *United States v. Accardo, supra* at 1478-79. Moreover,

contrary to the argument of counsel, the warrant in the case *sub judice* has been held not to "transgress the limitation on the good faith exception by the Supreme Court as cases involving warrants 'so facially deficient—i.e., failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' 104 S.Ct. at 3422." *U.S. v. Accardo* at 1481.

Under these same facts and circumstances presented on appeal, the Court determined that the good faith exception was applicable:

> On the facts considered by the district court at the suppression hearing, the pending appeal is within the good faith exception articulated in *Leon and Sheppard*. The agents here "took every step that could reasonably be expected of them." *Id.* As in *Sheppard*, the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. It is not relevant that here, unlike in *Sheppard*, the magistrate did not make changes in the warrant or expressly assure the agents that the warrant was adequate. Since the agents here did not use, and did not know that they used, an improper form, they had no reason to expect the magistrate to make changes in the warrant or to especially sure (sic) them of its adequacy. 749 F.2d at 1480-81

In light of the above holdings and the lack of any additional material facts being adduced at the hearing, the Court finds that under all the circumstances this cause falls within the good faith exception articulated in the Leon and Sheppard cases.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendants' Motion to Suppress is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 13th day of February, 1986.

/s/ JAMES W. KEHOE
United States District Judge

copies furnished to:

attorneys of record
Arnold Kanter, Esq
Samuel J Betar, Esq
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Thomas A Foran, Esq
John M Owens, AUSA

APPENDIX 3

[Filed February 19, 1982]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-230-CR-JWK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ACCARDO, et al.,

Defendants.

ORDER ON MOTION TO SUPPRESS
(Defendants DiFranco, P. Fosco, Norton and Pinckard)

The defendants Paul Fosco, James F. Norton, Paul A. Di Franco, and James Pinckard, have filed a joint motion to suppress evidence seized on October 6, 1976, from the offices of Consultants and Administrators, Inc., (C & A), and the offices of Pinckard and Associates, Inc., (Pinckard), as well as all fruits of these searches.

The government has filed a response in opposition to this motion, and the defendants have replied to the response. Because of the importance of the search warrant issue raised, the Court has accorded the appropriate parties full oral argument and an opportunity to supplement the memoranda already on file. After fully considering the matter and the authorities cited, the Court has determined that the challenged warrants were constitutionally flawed in that they were impermissible general warrants.

I.

Both of these searches were conducted pursuant to search warrants issued by Olga Jurco, United States Magistrate for the Northern District of Illinois, Eastern Division. The two warrants were issued by the Magistrate on October 5, 1976, and were based upon a single affidavit, sworn to and signed by James W. Wagner, a Special Agent of the F.B.I.

It is apparently agreed by the parties that although this is a joint motion, the defendant Pinckard has standing to challenge only the search of Pinckard and Associates and its fruits, and the defendants Fosco, Norton, and DiFranco have standing only to challenge the search of C & A and its fruits.

A careful study of the motion and memoranda and argument of counsel indicates that the first issue raised by the defendants has sufficient merit to invalidate these warrants. Since the warrants are invalid on their faces, no evidentiary hearing is necessary for this determination.

The defendants argue that the two search warrants authorized a general, exploratory search. General warrants are, of course, prohibited by the Fourth Amendment, which requires a particular description of the things to be seized. The purpose of this requirement is to prevent "a general exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). A thorough explanation of the history behind the prohibition against the use of general warrants is found in the opinion of *Stanford v. State of Texas*, 379 U.S. 506 (1965) (see also cases cited at fn. 5, p. 510) and need not be repeated here.

II.

The C & A warrant authorized a search for:

> all corporate records of Consultants and Administrators, Inc.; a black and vinyl book, approximately six inches wide by twelve inches long, containing copies

> of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The Pinckard warrant authorized a search for:

> all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The defendants claim that no probable cause was established by the supporting affidavit to believe that all of the corporate records were evidence and instrumentalities of crime, and that the warrants provided no guidance to the executing officers.

As a general principle, generic classifications in a warrant are acceptable only if no more precise description of the property to be seized is possible. *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981), *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980). It would be difficult to imagine language more generic than "all corporate records".

In this case the government contends that the affidavit for search warrant established probable cause to believe that the two corporations, C & A and Pinckard, conducted "no business which did not involve kickbacks", and that all of their records were therefore subject to search. The government asserts that it could not reasonably have been expected to specify what records were to be seized.

The affidavit for search warrant, however, clearly states that C & A operated clinics which provided medical, dental and vision services to union members and their families pursuant to contracts with specified labor unions. Pinckard, according to the affidavit, was paid by C & A to verify the eligibility of persons seeking health services from C & A under the union contracts. These are, of course, legitimate functions. Whether the individuals involved were giving and receiving kickbacks or not, those legiti-

mate functions of the corporations, such as the application for and receipt of health services by union members, were presumably memoralized in corporate records not subject to seizure by the government.

On the other hand, the affidavit clearly establishes probable cause to search for certain kinds of corporate records, such as cancelled receipts and checks, expense accounts, bank statements, bids made by C & A for contracts with labor unions, notes or other records of meetings during which kickbacks, methods of payment, and recipients were allegedly discussed, and the like. It is alleged in the affidavit, for instance, that Pinckard determined the amount of its monthly bill to C & A by a telephone call from Pinckard to Milano. Milano stated the monthly total of premiums paid to C & A on its Chicago area contracts, and Pinckard would bill C & A for 10% of that amount. Any records memoralizing such telephone calls, such as actual telephone records or ledgers showing computations of the type described, would be subject to seizure. The specific item designated in the C & A warrant is an example of the particularity required. There was ample probable cause to seize a black vinyl book containing copies of certain documents, although it, however was apparently not discovered during the search. The envelopes and the United States currency were validly seized pursuant to the warrant. Everything else seized during these two searches was seized as a general "corporate record".

The Courts have been zealous to safeguard the property rights protected by the Fourth Amendment in the context of general warrants. Just recently the Fifth Circuit considered a search warrant authorizing the seizure of pirated cassette tapes of copyrighted films. The Court upheld the seizure as to films specified in the warrant, but not as to those seized under the generic description in the warrant of "cassettes on to which . . . copyrighted films . . . have been electronically transferred and recorded." The Court held that the warrant provided insufficient guidance to the searching agents when it author-

ized the search of illegally obtained films not specified in the affidavit. *United States v. Cook*, supra.

Surely the term "all corporate records" is far more general than authorization to search for certain specified pirated cassettes and others of similar type. Furthermore, the government's contention that the challenged warrants were not general warrants because the objects to be seized left nothing to the discretion of the executing officers is simply without merit. It is no doubt true that the warrants authorized the seizure of "all corporate records" and an agent in possession of such a warrant need not discriminate between items to be seized and items to be left alone. But the Fourth Amendment prohibition against general warrants was designed to do more than prohibit discretionary searches by government agents. The requirement of particularity was not only to circumscribe the discretion of the executing officers, it was also to inform the person subject to the search and seizure what the officers are entitled to take. *Application of Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979).

The government has cited four cases in support of its claim that all of the records of a business permeated with fraud may be seized. The first is *National City Trading Corp. v. United States*, 635 F.2d 1020 (2d Cir. 1980). In that case the warrant specified numerous particular types of corporate records which could be seized. The claim was that these records may have included materials pertaining to legitimate legal records in a law office located within the business suite housing a commodities brokerage which was the subject of the search. The Court noted that the physical layout of the premises to be searched was described in great detail in the affidavit. Further, the affiant prepared a lengthy typed memorandum for the searching agents explaining that the search was not to reach the law practice. Finally, the Assistant United States Attorney also instructed the searching agents on the proper limitations of the search. The facts of the *National City Trading Corporation* case in which the search was upheld, are simply unlike this case. The warrants in

that case was far more specific, and limiting instructions were given.

The government also cites *United States v. Bithoney*, 631 F.2d 1 (1st Cir. 1980). The warrant in that case authorized the seizure of specific records pertaining to seventeen individuals. As the Court stated, the warrant:

> . . . undertook to narrow and identify the documents subject to seizure, breaking them down into specific categories. *Id.* at 2.

The government next cites *United States v. Brien*, 617 F.2d 299 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980). The warrant in that case authorized the seizure of:

> Lloyd Carr's bank statements, case [sic] receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists. *Id.* at 306.

The Court held:

> We hold that where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, *if they are, as here, accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized. Id.* at 309, (Emphasis added).

Finally, the government cites *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1978). Again, the warrants in the case were not general but were limited to documents and records pertaining to the efforts of the subject company to obtain confidential information from the telephone company.

A good summary of the law in this area is contained in *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980). The warrant in that case specified a search for:

> . . . certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and

> Abrams, London and Associates, Inc. which show actual medical services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001. *Id.* at 542.

Although the *Abrams* warrant was far more specific than those in this case, the Court discussed the law of such searches in great detail, noting that:

> Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in which a seizure of all records was held valid pursuant to a generally worded warrant such as we have here. In the cases we have canvassed where a seizure of records was upheld, there has been some limitation in the warrant as to the records to be seized. *Id.* at 545 (Citations omitted).

> The classic statement of the particularity required in search warrants was made by the Supreme Court of the United States in *Marron v. United States*, 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes *general searches* under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Many cases have come and gone since then, but this Court is unaware of any authorizing a search and seizure of "all corporate records," with no further description or limitation. If these warrants are upheld the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. Accordingly, it is this Court's considered judgment that the warrant is unconstitutionally general.

III.

The Court has also considered the remaining issues raised by the defendants, but finds none of them to require suppression. This Court finds probable cause in the affidavit to support a properly limited search of the two corporate premises. Nor does the affidavit fail for lack of reliability on the part of the informant. Further, although the defendants contend, with supporting affidavits, that there are material false representations in the affidavit, the facts contested for the most part go to the general issues in the case and must await trial. Indeed, many of the claimed misrepresentations were made not by the affiant agent, but by the informant.

Finally, the defendants allege that the agents exceeded their authority in executing the warrant, in that they seized materials which were not even within the broad general category of all corporate records. The remedy in such situations is, of course, suppression if the government should attempt to introduce such items in evidence, and return of the property upon a proper motion.

IV.

For all of these reasons, it is thereupon

ORDERED AND ADJUDGED that this motion to suppress is GRANTED upon the basis that the warrants were impermissibly general, and all materials seized pursuant to these warrants, as well as all fruits of such seizures shall be suppressed, except as to the envelopes and the United States currency, both of which were properly described in the C & A warrant.

DONE AND ORDERED in chambers at Miami, Florida, this 19th day of February, 1982.

/s/ James W. Kehoe
United States District Judge

CC: Magistrate Sorrentino
All Counsel of Record

APPENDIX 4

[Filed April 7, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5425

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES NORTON,

Defendant-Appellant.

No. 87-5648

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL FOSCO, JAMES PINKARD, PAUL A. DI FRANCO, JAMES NORTON,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

( ) The motion of appellants for (×) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of appellants for (×) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 5-15-89, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * * * *

/s/ ALBERT J. HENDERSON
United States Circuit Judge

APPENDIX 5

[U.S. v. Accardo, 749 F.2d 1477 (11th Cir. 1985)]

UNITED STATES of America,
Plaintiff-Appellant,
Cross-Appellee,

v.

Anthony ACCARDO, et al.,
Defendants-Appellees,
Cross-Appellants.

No. 82-5380.

United States Court of Appeals,
Eleventh Circuit.

Jan. 8, 1985.

Defendants moved to suppress evidence seized under search warrant, and the United States District Court for the Southern District of Florida, James W. Kehoe, J., granted the motion. On the Government's interlocutory appeal, the Court of Appeals, James C. Hill, Circuit Judge, held that the remand to district court was appropriate for determination whether good-faith exception to Fourth Amendment exclusionary rule applied, where district court conducted suppression hearing and, without considering whether there was a good-faith exception, found search warrant unconstitutionally general and suppressed evidence seized thereunder.

Vacated and case remanded.

Thornberry, Senior Circuit Judge, sitting by designation, concurred specially and filed opinion.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

CORRECTED OPINION

JAMES C. HILL, circuit Judge:

This appeal requires us to consider the good faith exception to the fourth amendment exclusionary rule, recently established by the Supreme Court in *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard*, ___ U.S. ___, 104 S.ct. 3424, 82 L.Ed.2d 737 (1984). In light of these 1984 decisions, we vacate the 1982 district court order, which suppressed evidence seized by officers under a warrant held by the district court to have been insufficiently particular to meet fourth amendment standards, and remand this case to the district court to determine whether those officers acted in good faith.

We briefly summarize the material facts considered by the district court in deciding whether to grant the motion to suppress. Federal agents in Chicago suspected several health care services companies of labor racketeering activities. Their investigation led them to Daniel G. Milano, Jr., a former officer of one of the companies under suspicion, Consultant and Administrators, Inc. (C & A). Milano, whose father was executive vice-president of C & A, told FBI agents that C & A paid labor union officials kickbacks to ensure that all C & A bids for union health services contracts were approved. According to Milano, C & A officials formed two companies, Pinckard and Associates, Inc. (Pinckard), and Fortune Services, to divert revenue from C & A into a kickback fund from which labor leaders were paid. Although Pinckard and Fortune primarily served as conduits for the payoff scheme, the companies also performed the task of verifying eligibility for coverage under the C & A contracts with the unions. Milano fully described the billing procedures used by Pinckard and Fortune, the manner in which illegal payments were made, and the collection of monthly cash contributions from C & A officers for distribution to union officials.

At the conclusion of this investigation, an FBI agent swore out an affidavit in which he recounted Milano's description of the alleged kickback scheme. The affidavit detailed the completeness of the fraud that permeated the business dealings between the companies involved. Based on that affidavit, a federal magistrate in Chicago issued warrants authorizing the search of the administrative offices of C & A and Pinckard. Federal agents conducted such a search and seized several volumes of documents from both companies.

Racketeering charges were then filed in the District Court for the Southern District of Florida against various labor leaders and officers of C & A and Pinckard.[1]

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[1] An independent federal investigation in Miami apparently led authorities there to suspect several of the figures under investigation in Chicago of similar criminal activity in Florida. Indeed, a federal grand jury in Miami issued subpoenas *duces tecum* to various C & A and Pinckard officers and defendant-appellee Di Franco, requiring them to produce most of the materials seized in the search now under attack. The district court ruled that the documents obtained by the subpoena were not tainted by the illegal searches and denied suppression motions as to that evidence. Whether the materials seized in the challenged search are thus subject to the "independent source" rule, *see Segura v. United States*, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), or the "inevitable discovery" doctrine, *see United States v. Kroesser*, 731 F.2d 1509 (11th Cir. 1984), are questions we need not decide.

We also see no reason to consider whether defendants-appellees can invoke the interlocutory appeal provisions of 18 U.S.C. § 3731, *see United States v. Moody*, 485 F.2d 531, 534 (3d Cir. 1973) (allowing cross-appeal), to challenge the district court's refusal to suppress the evidence obtained by subpoena. Since we vacate the order suppressing the records seized in the C & A and Pinckard searches, the order defendants-appellees seek to appeal may be unnecessary to the district court's disposition of the suppression motions. Whether this is the case depends on how the district court resolves the good faith issue on remand. *See infra*, 1479-80. This court therefore will wait for resolution of that issue and not address herein the question involving invocation of the interlocutory appeal provisions of 18 U.S.C. § 3731.

Shortly after they were indicted, defendants[2] moved to suppress all materials seized in the C & A and Pinckard searches. The district court conducted a suppression hearing, and, finding the warrant issued by the Chicago magistrate "unconstitutionally general," suppressed the corporate records seized from the offices of C & A and Pinckard. At the hearing, the district court did not consider whether there was a good faith exception to the fourth amendment exclusionary rule, nor whether the FBI agents had acted in good faith. The United States subsequently brought this interlocutory appeal pursuant to 18 U.S.C. § 3731 (1976), challenging the district court's suppression order on the ground that the officers had acted in good faith.[3] We now vacate and remand.

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[2] At the time these charges were filed, defendant-appellee Pinckard was president of Pinckard and Associates, Inc.; defendant-appellee Fosco was president of PF Insurance Agency and vice-president of C & A, Inc.; and defendant-appellee Norton was president of C & A, Inc.; and defendant-appellee Di Franco was vice-president of Dental and Vision Care Centers, Inc., a company that allegedly provided kickback monies to receive union health care business. *See* Supp. Record on Appeal at 1-14.

The district court found that among the twelve named codefendants only Pinckard, Fosco, Norton and Di Franco had standing to challenge the searches. Therefore, they are the only parties to the government's appeal.

[3] The Government did not originally challenge the district court's conclusion that the warrants were impermissibly general, *see Stanford v. Texas*, 379 U.S. 476, 481-86, 85 S.Ct. 506, 509-12, 13 L.Ed. 2d 431 (1965), instead urging this court to extend our ruling in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981), to encompass the officers' actions in this case. *See* Brief for Appellant at 13-26.

Shortly before this case was orally argued, however, the government submitted authorities that supported the validity of broad warrants covering searches of businesses permeated with fraud. *See, e.g., United States v. Offices Known As 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983). While we chose to dispose of this appeal as it was briefed by all parties, we note that the af-

(Footnote continued on following page)

Since the district court issued the suppression order in 1982, the Supreme Court has held that there is a good faith exception to the exclusionary rule. In *United States v. Leon* the Supreme Court considered "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 104 S.Ct. at 3409. The Court answered that question by taking yet another look at the remedial objectives thought served by the exclusionary rule. *Id.* at 3414-16. Concluding that the rule remains viable only as a deterrent to police misconduct, the Court held that the costs to the administration of justice of excluding highly probative evidence outweighed any benefits from the rule's deterrent effect where police officers have acted in objectively reasonable reliance on a warrant later found to be defective. *Id.* at 3419-21. With certain well-defined limitations,[4] the rule announced by the Court required

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[3] *continued*
fidavit supporting the C & A and Pinckard search warrants alleged that Pinckard was incorporated solely as a conduit for the flow of kickback monies. Thus, at least with respect to Pinckard, the magistrate who issued these warrants might have had reason to authorize the seizure of "all corporate records." *See, e.g., United States v. Brien*, 617 F.2d 299, 305-09 (1st Cir.) (approving warrant authorizing seizure of materials that made up "most of the business records" of investment firm), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980); *see generally United States v. Wuagneux*, 683 F.2d 1343, 1348-51 (11th Cir. 1982) (collecting cases on warrants in context of complex, fraudulent business schemes), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).

[4] The Court explained three instances where, although the officer has acted in good faith, suppression remains an appropriate remedy:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*,

(Footnote continued on following page)

suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 3423. The, turning to the facts before it, the Court found the officers' reliance on the magistrate's determination of probable cause to be reasonable; the warrant was supported by much more than a "bare bones" affidavit and was not seriously challenged by any of the defendants. Under those circumstances, the Court discerned no reason for applying the "extreme sanction of exclusion." *Id.* at 3423.

Massachusetts v. Sheppard presented a situation seemingly analogous to the case before this court. In *Sheppard* the trial judge suppressed evidence seized during the execution of a warrant that failed to describe with particularity the items to be seized. 104 S.Ct. at 3428. The Supreme Judicial Court of Massachusetts refused to recognize a good faith exception to the exclusionary rule and affirmed. The Supreme Court reversed, emphasizing that the officers had evidenced their good faith by submitting an affidavit to a judge, who then drafted a warrant authorizing the search. *Id.* at 3429. Any error in fail-

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[4] *continued*

442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. [590] at 610-611, 95 S.Ct. [2254] at 2265-2266 [45 L.Ed.2d 416 (1975)] (POWELL, J., conturring in part); *see Illinois v. Gates*, *supra*, 462 U.S. [213] at [246], 103 S.Ct. [2317] at [2336] [76 L.Ed.2d 527 (1983)] (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, ____ U.S., at ____, 104 S.Ct. at ____.

104 S.Ct. at 3422.

ing to meet the particularity requirement of the fourth amendment, the Court held, was committed by the judge, not the police officers. *Id.* Therefore, the officers' conduct was objectively reasonable and well within the bounds of the rule announced in *Leon*.

On the facts considered by the district court at the suppression hearing, the pending appeal is within the good faith exception articulated in *Leon* and *Sheppard*. The agents here "took every step that could reasonably be expected of them." *Id.* As in *Sheppard*, the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. It is not relevant that here, unlike in *Sheppard*, the magistrate did not make changes in the warrant or expressly assure the agents that the warrant was adequate. Since the agents here did not use, and did not know that they used, an improper form, they had no reason to expect the magistrate to make changes in the warrant or to especially assure them of its adequacy.

Moreover, the warrant's authorization to seize "all corporate records" does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants "so facially deficient—*i.e.*, failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." 104 S.Ct. at 3422. Arguably, "all corporate records" is significantly more general than the "any controlled substance" language contained in the *Sheppard* warrant. 104 S.Ct. at 3427 & n. 2. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it. This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant," *id.* at 3429 n. 7 (quoting *Illinois v.*

Gates, 462 U.S. 213 at ____, 103 S.Ct. 2317 at 2345, 76 L.Ed.2d 527). In addition, the investigating officers were told by a former C & A executive that Pinckard was a sham corporation. Every indication was that C & A officials were extensively involved in the kickback scheme. This type of complex financial fraud, sometimes referred to as the "paper puzzle," has been held to justify a more flexible reading of the fourth amendment particularity requirement. *See, e.g., United States v. Wuagneux*, 683 F.2d 1343, 1348-50 (11th Cir. 1982) (citing cases), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).[5]

On the facts considered by the district court in deciding whether to grant the motion to suppress, the good faith of the officers would be established. However, we are mindful that at the time of the suppression hearing *Leon* and *Sheppard* had not been decided, and that the district court did not hold an evidentiary hearing on, nor in any way consider, the issue of the officers' good faith. Although the ultimate question of good faith *vel non* is a legal issue, which this court may resolve, the ascertainment of the facts upon which to base a determination regarding good faith is for the district judge. In *Leon*, the Supreme Court said that in determining whether a police officer acted in good faith, "all of the circumstances . . . may be considered." 104 S.Ct. at 3421 n. 23. It is not clear that we have had the opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue. Both parties should be given an opportunity to present evidence touching upon the conduct of the officers. We therefore feel it best to remand the case to the district court, where the parties

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[5] In *Wuagneux* the court upheld a warrant that in part authorized the seizure of records of "the receipt and disbursement of kickback funds." *Wuagneux*, 683 F.2d at 1350-51. The court emphasized that despite the generality of this description, it was properly construed as referring to a very special detailed kickback scheme in view of the affidavit that accompanied it. *Id.* This reasoning reinforces the conclusion in the present case.

shall be afforded a hearing on the good faith issue. The district court, guided by *Leon* and *Sheppard*, and this opinion, then may determine whether the officers acted in good faith.

Accordingly, the order of the district court is VACATED and this case is REMANDED for proceedings consistent with this opinion.

THORNBERRY, Senior Circuit Judge, sitting by designation, concurring specially:

Since "[i]t is not clear that we have had an opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue," and "[w]e therefore feel it is best to remand the case to the district court, where both parties shall be afforded a hearing on the good faith issue," I concur only in that portion of the court's opinion which supports the decision to remand the case to the district court.

APPENDIX 6

United States of America
vs.
JAMES F. NORTON

United States District Court for Southern District of Florida, Docket No. 81-230-CR-KEHOE (8)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

____ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL THOMAS DECKER, ESQ.

____ GUILTY, and the court being satisfied that there is a factual basis for the plea,
____ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
____ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as

charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
JAMES PINCKARD

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (12)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL ARNOLD KANTER, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
PAUL FOSCO

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (5)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL SAMUEL BETAR, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota or in the alternative, Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
PAUL A. DI FRANCO

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (3)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL THOMAS FORAN, ESQ. and JACK CARRIGLIO, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota or in the alternative, Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

APPENDIX 7

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 208

UNITED STATES OF AMERICA,

vs.

The administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois

SEARCH WARRANT

To Any Special Agent of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Consultants and Administrators, Inc.; a black vinyl book, approximately six inches wide by twelve inches long, containing copies of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense

set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME 4:45 P.M.

/s/ Olga Jurco
U.S. Magistrate

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

APPENDIX 8

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 209

UNITED STATES OF AMERICA,

VS.

The administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Ill.

SEARCH WARRANT

To Any Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so

described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME _____

/s/ Olga Jurco
U.S. Magistrate

---

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

APPENDIX 9

ANY VERDICT MUST REPRESENT THE CONSIDERED JUDGMENT OF EACH JUROR. IN ORDER TO RETURN A VERDICT, IT IS NECESSARY THAT EACH JUROR AGREE THERETO. IN OTHER WORDS, YOUR VERDICT MUST BE UNANIMOUS.

IT IS YOUR DUTY AS JURORS, TO CONSULT WITH ONE ANOTHER, AND TO DELIBERATE IN AN EFFORT TO REACH AGREEMENT IF YOU CAN DO SO WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS. IN THE COURSE OF YOUR DELIBERATIONS, DO NOT HESITATE TO RE-EXAMINE YOUR OWN VIEWS AND CHANGE YOUR OPINION IF CONVINCED IT IS ERRONEOUS. BUT DO NOT SURRENDER YOUR HONEST CONVICTION AS TO THE WEIGHT OF EFFECT OF THE EVIDENCE SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS, OR FOR THE MERE PURPOSE OF RETURNING A VERDICT.

REMEMBER AT ALL TIMES, YOU ARE NOT PARTISANS. YOU ARE JUDGES—JUDGES OF THE FACTS. YOUR SOLE INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE.

Instruction No. 32

APPENDIX 10

Judge James Kehoe

Your Honor,

In order to avoid another lengthy & expensive trial, would it be possible to surrender my seat # 8 to the No. 1 alternate juror to get a verdict in this case?

I have *reasonable doubts* in this case and the 11 other jurors are voting guilty on all four defendants. My conscious tells me otherwise & I dislike having to have a hung jury.

I would appreciate your help in my behalf.

Thank You Kindly

Robert J. Larson
Juror # 8

Must I vote with the majority, even under duress, your Honor?

Please advise.

EXHIBIT A